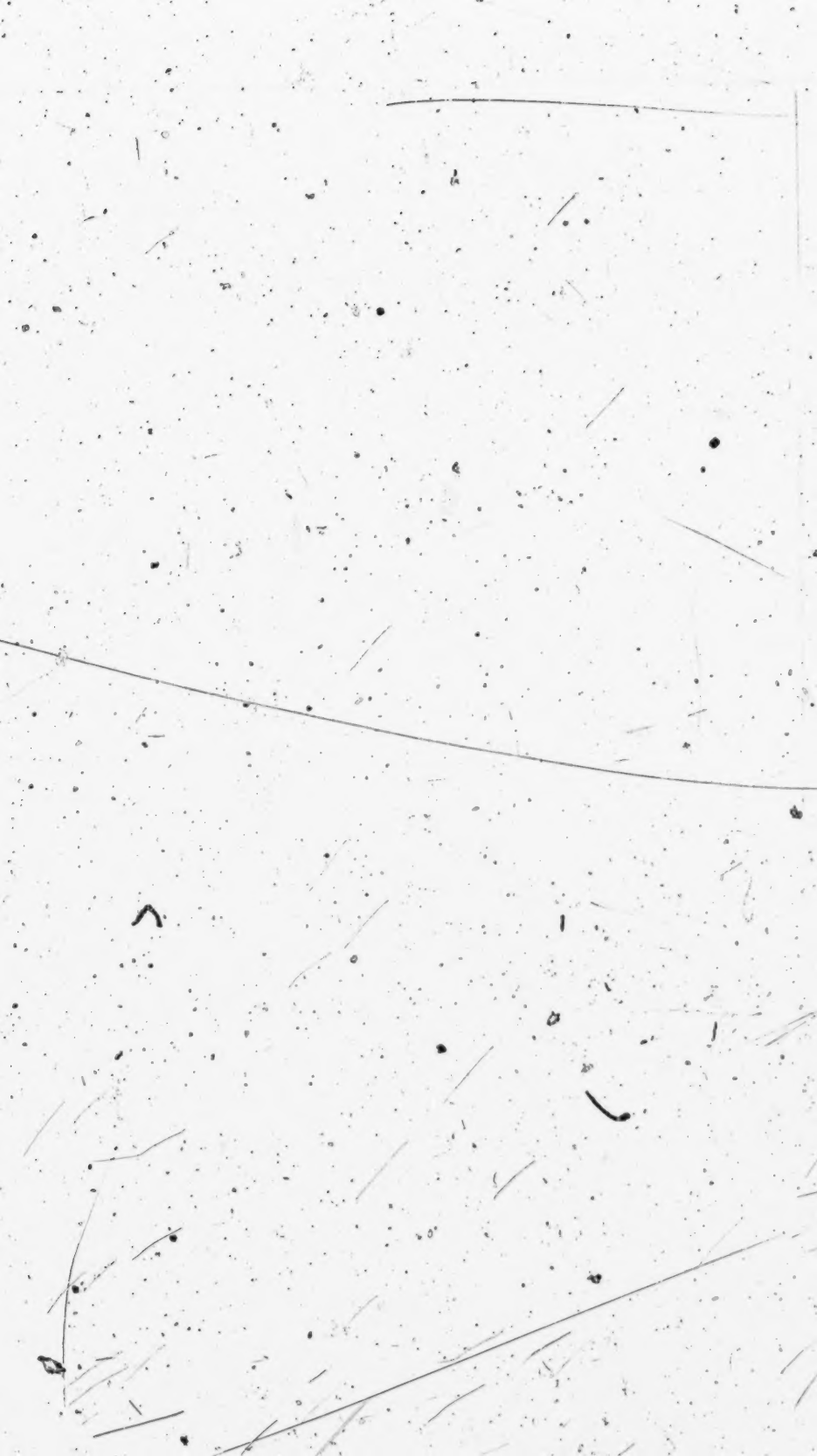

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service, Los Angeles, California,

Petitioner,

vs.

GEORGE FLEUTI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals (Pet. App. A. pp. 20-32)[1] is reported at 302 F. 2d 652 (1962).

[1] "R." refers to the printed record in the Court of Appeals which is consecutively paginated. This record was lodged with the Clerk of the Court by petitioner together with the authenticated record of the deportation proceedings which was received in evidence in the District Court as Exhibit "A" to the motion by the Immigration and Naturalization Service for summary judgment [R. 18-19]. "Ex" followed by a number refers to the numbered exhibits which were received in evidence at the District Court proceedings, which exhibits are also contained in petitioner's Exhibit "A."

Jurisdiction.

The judgment of the Court of Appeals was entered on April 17, 1962 [R. 43; Pet. App. A, p. 32]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Whether the application of Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4), as applied to respondent deprived him of his Constitutional guarantee of due process of law in that it was void for vagueness.

Statutes Involved.

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4).

Statement.

Appellant, George E. M. Fleuti, is a fifty (50) year old native and citizen of Switzerland who was admitted to the United States for permanent residence on October 9, 1952. He has resided continuously within the United States of America as a permanent resident since his admission except for a visit of a few hours to Ensenada, Mexico, during August, 1956. Appellant last entered the United States at San Ysidro, California, during August, 1956, after the aforementioned temporary visit to Mexico.

The appellant has been employed in hotel administrative work and has been undergoing psychiatric care and treatment. In a previous communication, Exhibit A [R. 18-19], the treating physician, Dr. David R. M. Harvey, found, as a matter of fact that the plaintiff

is not, and was not, a sexual psychopath, and that his sexual drive is thought to be within his range of control. Such report was based on comprehensive numerous visits. For purposes of classifying appellant for deportation purposes, the Member of the United States Public Health Service concluded otherwise only after a single examination.

Appellant's training includes experience in administrative hotel work in Europe, in Los Angeles, California, with the Ambassador Hotel and in Ojai, California, the location of his present place of employment. His present employers indicate that appellant's conduct and service as Front Office Manager, has, in all respects, been superior in quality and that his honesty and integrity is exemplary.

The charges of deportability arose out of a misdemeanor conviction in the Superior Court of the State of California in and for the County of Los Angeles for a violation of Section 288(a) of the Penal Code of California in February, 1956 [Ex. 2 in the United States District Court, Southern District of California, Central Division, case number 1275-59K Civil]; and a conviction in the Municipal Court, Los Angeles County, California, on August 27, 1953, for violation of Section 647(5) of the California Penal Code [Ex. 7].

A prior order of deportation was issued April 20, 1959, after an initial hearing before the United States Department of Justice Special Inquiry Officer in Los Angeles, California, ordering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204, on the ground that respondent was subject to deportation at

the time of his entry for the alleged reason that he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude. Subsequent thereto, a Motion to Reopen Proceedings was made and granted wherein it was conceded by the Special Inquiry Officer in the Order Reopening Proceedings, that respondent's petty offense did not constitute a sufficient basis for deportation on the charge contained in the Order to Show Cause. The conviction in 1953, as decided by the Special Inquiry Officer, is not a crime involving moral turpitude and respondent was not an alien excludable at the time of entry under the provisions of Section 212(a)(9).

On or about September 22, 1959, an order of deportation was issued after a hearing before the Immigration Service's Special Inquiry Officer in Los Angeles, California ordering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204 on the ground that respondent was subject to deportation at the time of his entry for the alleged reason that he was within one or more of the classes of aliens afflicted with Psychopathic Personality under Section 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. 1182(a)(4), 66 Stat. 182.

The findings and order of deportation was appealed to the Board of Immigration Appeals and the said Board dismissed respondent's appeal on November 20, 1959. (Pet. App. B, pp. 33-38). Thereafter, a complaint was filed on behalf of respondent on December 9, 1959, in the United States District Court, Southern District of California, Central Division [R. 3-6, 10]. On January 9, 1961, an order of the United States District Court, Southern District of California, Central Division was granted on petitioner's motion for summary judgment [R. 19-21].

On April 17, 1962, the deportation order was set aside by the Court of Appeals for the Ninth Circuit based on its determination that the term "psychopathic personality" is void for vagueness as applied to respondent, hence depriving him of his constitutional guarantee of due process of law (Pet. App. A, pp. 20-32).

ARGUMENT.

The Judgment of the Court of Appeals for the Ninth Circuit Is Correct in Deciding a Well Established Question of Constitutional Law and Is Not in Conflict With Any Other Decision, so as to Warrant Further Review of the Case by This Court.

A. Scope of the Court of Appeals Decision.

The Court below was very emphatic in expressing that they were only considering the question in the context of the case before them "without undertaking to determine whether the statute is necessarily void for vagueness with regard to all possible application" (Pet. App. A, 28, footnote 11). It is clear then, that the Court was not deciding whether the statute was invalid as to "a" or "all" homosexuals as the petitioner seems to infer (Pet. 2). Thus, the sole question before the lower court was whether Section 212(a)(4), with specific reference to the clause "Aliens afflicted with psychopathic personality", was constitutionally applied to respondent Fleuti by the Special Inquiry Officer, Immigration and Naturalization Service.[2]

The conduct of respondent between his entry in 1952 and his brief absence in 1956 was regarded by the Court of Appeals, together with his conduct after reentry in 1956, as "post entry behavior" (Pet. App. A, 27). This would mean that respondent, as a legal resident of the United States, was entitled during these periods to Constitutional guarantees, among others, of

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[2]The Court of Appeals regarded this hearing as an initial judicial review pursuant to 8 U. S. C. 1105a and 5 U. S. C. 1031 *et seq.* For further explanation see footnote (1) of opinion (Pet. App. A, 20).

due process of law. Hence, if a statute is to affect him and inflict harsh consequences upon him by virtue of his conduct, then such a statute must give fair notice of its purview as required under the Fifth Amendment.

It was further concluded by the Court of Appeals that the records indicated that:

> "... continuance of homosexual practices after Fleuti entered this County in 1952, and again in 1956, was not compulsive, but was a matter of choice. It follows that if, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a 'psychopathic personality' Fleuti was substantially prejudiced." (Pet. App. A, pp. 26, 27).

In proving that, at the time of his 1956 entry, respondent was a "psychopathic personality", and thus excludable, the Immigration and Nationality Service had relied on evidence of respondent's behavior after his first entry in 1952 and after his second entry in 1956. From these premises the Court concluded that since respondent was a lawful resident at the time the acts occurred which were relied upon by the Service as a basis of deportation, then respondent could now assert any prejudicial application of a statute against him. The question then is whether the deportation statute wherein appears "the undefined term 'psychopathic personality' is void for vagueness, as applied in this case." (Pet. App. A, p. 28).

The court reviewed the legislative history behind this statute, but reminded that "in determining whether a statute is void for vagueness, the statute must be judged

on its face without reference to legislature history" (Pet. App. A, p. 28), further adding, that the criteria for determination of vagueness in the constitutional sense is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice (Pet. App. A, p. 28). *Jordan v. DeGeorge*, 341 U. S. 223, at page 231. Also see *United States v. Harriss*, 347 U. S. 612, 617; *United States v. Petrillo*, 332 U. S. 1, 6.

Thereafter, upon extensive examination of the following evidence, the Court of Appeals arrived at the conclusion that the statute has been unconstitutionally applied to respondent because it is void for vagueness:

(1) The way that Dr. A. R. Dahlgren, the Public Health Service surgeon (who was not a psychiatrist) had arrived at his certification that respondent was a "psychopathic personality", to wit: Dr. Dahlgren classified respondent because the Public Health Service Manual for examination of aliens required him to so certify anyone who is a sex deviate (Pet. App. A, p. 29). The court indicated that if it were not so required Dr. Dahlgren may have classified respondent otherwise.

(2) Dr. David R. Harvey, respondent's attending psychiatrist, was of the opinion that respondent's deviation is not sufficient to justify the diagnosis of psychopathic personality, but rather the technical label should be "sexual deviation, homosexuality now under control" (Pet. App. A, pp. 29, 30).

(3) The Public Health Service itself considered the term "vague and indefinite, but no more appropriate

than can be suggested at this time" (Pet. App., A, p. 31).

(4) Authoritative writers in this field are in disagreement of the scope of this term, thus confirming that it is "vague and indefinite" (Pet. App. A, p. 31, footnote 15 at p. 30; footnote 19 at p. 31). When an expert in the field is vague as to the meaning of these words, how can a man of common intelligence be certain?

It is therefore submitted that the Decision of the Court of Appeals, was based on a Constitutional ground well established by this Court, namely, that a statute which is so vague and indefinite as to fail to give fair notice of what persons are affected or what conduct is prohibited, violates due process. *Jordan v. DeGeorge*, *supra*, at page 231; *United States v. Harriss*, *supra*, at page 617; *United States v. Petrillo*, *supra* at page 6.

The application of a Constitutional safeguard here is not unusual. The court in *Harisiades v. Shaughnessy*, 342 U. S. 580, along with deciding whether an alien member of the Communist party was deportable under a retroactive statute, also considered whether the First Amendment rights of that person were infringed upon.

B. The Court Below Is Not in Conflict With Any Other Court of Appeals.

It is submitted that the judgment of the Court of Appeals is not in conflict with the decision in *Quiroz v. Neelly*, 291 F. 2d 906 as the court in the latter case did not raise and consider the constitutional question of due process. Neither were facts indicated in that case

to warrant the raising of such an issue as was considered in the instant case. It is also again reiterated that the Court below decided that the statute in question was void for vagueness in this particular context.

C. An Analysis of Petitioner's Arguments.

Petitioner strenuously argues the power of Congress to define the standards for entry of an alien into this country and also that a re-entry of an alien is just like an initial entry, *i.e.*, the same standards may be required. In so arguing the real question considered by the Court of Appeals is begged, to wit, once a citizen becomes a legal resident, is he entitled to due process of law under our constitution. That an alien is so entitled was settled in the leading case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); later authorities for this proposition include: *United States ex rel. Barile v. Murff*, 116 Fed. Supp. 163 (1953); *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953); *Galvan v. Press*, 347 U. S. 522 (1954), Rehearing denied 348 U. S. 852. Further, in this Court in *Harisiades v. Shaughnessy, supra*, in determining the deportability of an alien under an *ex post facto* statute also considered the possible violation of an alien's rights under the First Amendment by the application of the statute in question there. Even though re-entry entails the same requirements as entry, yet it does not follow that an alien's rights when residing here were also "washed out" by a few hours in Mexico, as the court below stated (Pet. App. A, p. 28). The logical extension of such a conclusion would be to permit property acquired by the alien resident to be confiscated without due process, if he happens to travel abroad, a Constitutionally precarious position indeed.

(5) There is some question in petitioner's mind as to the validity of the lower court's statement that once a statute is judged to be void for vagueness on its face, access may not be had to legislative history in order to establish its meaning. This doubt arises principally from two cases: *Screws v. United States*, 325 U. S. 91; *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1941). The *Screws* case can be distinguished in that the statute in question there required "specific intent" to violate. The court theme in clarifying their position stated on page 101, that:

> "The court, indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. . . . But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

In *Chaplinsky v. New Hampshire, supra*, this court on page 574 distinguished the problems involved there from those in *Lanzetta v. New Jersey*, 306 U. S. 451, wherein it was held that the gloss of judicial decision cannot otherwise correct the deficiency of a statute void for vagueness on its face. It is contended by the petitioner's that the Court of Appeals went too far when it held that legislative history cannot be used to

clarify a vague statute. This conclusion, however, is inevitable in light of the rationale of the void for vagueness rule. If judicial decisions, which are essential in the activities of the people, cannot correct uncertainty and vagueness in a statute, then can an event so far removed as legislative history ever provide fair notice?

Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

HIRAM W. KWAN,
Attorney for Respondent.